FILED
OCT 13 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(2)

No. 06-465

IN THE

Supreme Court of the United States

SHARON PRICE AND MICHAEL FRUTH, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

PHILIP MORRIS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

BRIEF IN OPPOSITION

JAMES R. THOMPSON
GEORGE C. LOMBARDI
JEFFREY M. WAGNER
JULIE A. BAUER
STUART ALTSCHULER
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, IL 60601-9703
(312) 558-5600

MURRAY R. GARNICK*
JAMES M. ROSENTHAL
ARNOLD & PORTER LLP
555 12th Street, N.W.
Washington, D.C. 20004
(202) 942-5000

Counsel for Respondent

October 13, 2006 * Counsel of Record

(*Additional counsel listed on inside cover*)

KENNETH S. GELLER
MAYER, BROWN, ROWE &
MAW LLP
1909 K Street N.W.
Washington, D.C. 20006
(202) 263-3000

ANDREW H. SCHAPIRO
MAYER, BROWN, ROWE &
MAW LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

MICHELE L. ODORIZZI
MAYER, BROWN, ROWE &
MAW LLP
71 South Wacker Drive
Chicago, IL 60606
(312) 782-0600

Counsel for Respondent

QUESTION PRESENTED

The Illinois Supreme Court held that the Illinois Consumer Fraud and Deceptive Business Practices Act barred any claims brought under that statute arising out of respondent's use of the descriptors "lights" and "lowered tar and nicotine" in the labeling of its cigarettes. In so holding, the Illinois court stated that it "resolved the present case entirely on the basis of state law by construing and applying an exemption clause in a state statute." Pet. App. 87a.

The only question presented by this case is the following state-law issue: Whether the Illinois Supreme Court erred in interpreting the state-law statutory exemption to bar petitioners' state-law claims.

CORPORATE DISCLOSURE STATEMENT

Respondent makes the following corporate disclosure statements pursuant to Supreme Court Rule 29.6:

Respondent Philip Morris USA Inc. is a wholly owned subsidiary of Altria Group, Inc.[1] Altria Group, Inc. is the only publicly held company that owns 10% or more of Philip Morris USA Inc.'s stock.

---

[1] Altria Group, Inc. (identified in plaintiffs' complaint by its former name, Philip Morris Companies Inc.) was dismissed from this lawsuit on January 7, 2003.

TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF THE CASE 3

A. The Complaint 3

B. Trial 6

C. The Illinois Supreme Court Decision 9

REASONS FOR DENYING THE PETITION 12

I. THIS COURT HAS NO JURISDICTION TO GRANT THE PETITION 12

II. EVEN IF THIS COURT HAD JURISDICTION, THIS CASE WOULD NOT WARRANT REVIEW 17

A. No Conflict Exists As To Whether Agencies Can Use Consent Decrees To Provide Direction And Set Regulatory Policy 18

B. No Conflict Exists As To Whether A Consent Decree Can Be Enforced Against A Non-party -- An Irrelevant Issue Here 23

C. No Conflict Exists With The Prior Holdings Of This Court 24

D. Petitioners Have Waived Any Argument That The CFA's Exemption Implicates Federal Law 25

CONCLUSION 27

TABLE OF AUTHORITIES

CASES **Page(s)**

Airmark Corp. v. FAA,
758 F.2d 685 (D.C. Cir. 1985) 20

Alaska v. O'Neill Investigations, Inc.,
609 P.2d 520 (Alaska 1980) 19

Aspinall v. Philip Morris, Cos., Inc.,
No. 98-6002, slip op.
(Mass. Super. Ct. Aug. 9, 2006) 17

Auer v. Robbins,
519 U.S. 452 (1997) 3, 26

Aurora Firefighter's Credit Union v. Harvey,
516 N.E.2d 1028 (Ill. App. Ct. 1987) 26

Avery v. State Farm Mut. Auto. Ins. Co.,
835 N.E.2d 801 (Ill. 2005),
cert. denied, 126 S. Ct. 1470 (2006) 1

Bath Iron Works Corp. v. Dir., Office of Workers' Comp. Programs,
506 U.S. 153 (1993) 3, 26

Beatrice Foods Co. v. FTC,
540 F.2d 303 (7th Cir. 1976) 22

Carson v. American Brands, Inc.,
450 U.S. 79 (1981) 25

Cent. Tex. Tel. Co-op, Inc. v. FCC,
402 F.3d 205 (D.C. Cir. 2005) 19

Contractors Transp. Corp. v. United States,
537 F.2d 1160 (4th Cir. 1976) 20

EEOC v. Fed'l Labor Relations Auth.,
476 U.S. 19 (1986) 26

El Rio Santa Cruz Neighborhood Health Ctr. Inc. v. Dep't of Health & Human Servs.,
300 F. Supp. 2d 32 (D.D.C. 2005) 21

Exxon Chem. Patents, Inc. v. Lubrizol Corp.,
137 F.3d 1475 (Fed. Cir. 1998) 26

FTC v. Mandel Bros. Inc.,
359 U.S. 385 (1959) 19

Flanagan v. Altria Group, Inc.,
No. 05-71697, 2005 WL 2769010
(E.D. Mich. Oct. 25, 2005) 17

Ford Motor Co. v. FTC,
547 F.2d 954 (6th Cir. 1976) 20

Gen. Motors Corp. v. Abrams,
897 F.2d 34 (2d Cir. 1990) 19

Henry v. Mississippi,
379 U.S. 443 (1965) 12, 14

Herb v. Pitcairn,
324 U.S. 117 (1945) 12, 14

Holloway v. Bristol-Myers Corp.,
485 F.2d 986 (D.C. Cir. 1973) 19

Illinois v. Gates,
462 U.S. 213 (1983) 14

Illinois v. Rodriguez,
497 U.S. 177 (1990) 14

In re Club Assocs.,
956 F.2d 1065 (11th Cir. 1992) 26

In re Lorillard,
92 F.T.C. 1035 (1978) 5

Intergraph Corp. v. Intel Corp.,
253 F.3d 695 (Fed. Cir. 2001) 23

Jackson v. South Holland Dodge, Inc.,
197 Ill. 2d 39 (2001) 26

Jenkins v. Mercantile Mortgage Co.,
231 F. Supp. 2d 737 (N.D. Ill. 2002) 26

Lambrix v. Singletary,
520 U.S. 518 (1997) 14

Lanier v. Assocs. Fin., Inc.,
114 Ill. 2d 1 (1986) 26

Local Number 93, International Association of Firefighters v. City of Cleveland,
478 U.S. 501 (1986) 25

Marco Sales Co. v. FTC,
453 F.2d 1 (2d Cir. 1971) 20

Mary Carter Paint Co. v. FTC,
333 F.3d 654 (5th Cir. 1954) 21

Michigan v. Long,
463 U.S. 1032 (1983) 14, 16

Miller v. Police Board, City of Chicago,
349 N.E.2d 544 (Ill. App. Ct. 1976) 26

NLRB v. Bell Aerospace Co.,
416 U.S. 267 (1974) 18, 19

Oregon v. Guzek,
126 S. Ct. 1226 (2006) 12

Sakon v. Pepsico, Inc.,
553 So. 2d 163 (Fla. 1989) 23

San Francisco Police Officers' Ass'n v. City & County of San Francisco, 812 F.2d 1125 (9th Cir. 1987), *op. amended and superseded by*, 869 F.2d 1182 (9th Cir. 1988) 19

Schubach v. Household Fin. Corp.,
376 N.E.2d 140 (Mass. 1978) 19

Sochor v. Florida,
504 U.S. 527 (1992) 14

Standard Oil Co. v. Johnson,
316 U.S. 481 (1942) 14

Sullivan v. Philip Morris USA Inc.,
No. 03-796, 2005 WL 2123702 (W.D. La. Aug. 31, 2005), *appeal granted on other grounds*, Nos. 06-1, 06-30311 (5th Cir. Mar. 27, 2006) 17

Trans Union Corp. v. FTC,
245 F.3d 809 (D.C. Cir. 2001)..... 21, 22

United States v. Armour & Co.,
402 U.S. 673 (1971) 24

United States v. E.I. du Pont de Nemours & Co.,
366 U.S. 316 (1961) 24

United States v. Undetermined Quantities of an Article of Drug Labeled as Exachol,
716 F. Supp. 787 (S.D.N.Y. 1989) 21

Watson v. Philip Morris Cos., 420 F.3d 852 (8th Cir. 1005), *petition for cert. filed*, 74 U.S.L.W. 3588 (U.S. Apr. 7, 2006) (No. 05-1284) & *invitation to U.S. Solicitor General to participate pending* (U.S. May 22, 2006). 16

Whitinsville Plaza, Inc. v. Kotseas,
390 N.E.2d 243 (Mass. 1979)..... 23

STATUTES

815 ILCS 505/10b(1)..... *passim*

815 ILCS 510/4 2

16 C.F.R. § 2.34..... 7, 20

15 U.S.C. § 45 ..... 23, 24

28 U.S.C. § 1257 ..... 2, 12

ADMINISTRATIVE MATERIALS

59 Fed. Reg. 51,980 (Oct. 13, 1994) 7

62 Fed. Reg. 48,158 (Sept. 12, 1997) 8

RULES

Sup. Ct. R. 10 ..... 2, 12

MISCELLANEOUS

2 Federal Procedure § 2:71 (Lawyers Ed. 2005) 20

Alfred Aman & William T. Mayton, Administrative Law § 9.4 (West 1993) 20

Charles H. Koch, 2 Administrative Law & Practice § 5.43 (1997) 20

K.C. Davis, Administrative Law & Government (2d ed. 1975) 20

Lester Brickman, *Anatomy of a Madison County (Illinois) Class Action: A Study of Pathology*, 6 Civil Justice Report (Aug. 2002), *available at* http://www.manhattan-institute.org/html/cjr_6.htm 1

National Consumer Law Center, *Unfair and Deceptive Acts and Practices* § 3.4.5.1 (5th ed.) 14

Robert J. Greene, *Hybrid State Law in the Federal Courts,* 83 Harv. L. Rev. 289 (1969) 14

Wright & Kane, 20 *Fed. Prac. & Proc. Deskbook* § 114 (2006) 14

INTRODUCTION

In this case, a trial court in Madison County, Illinois entered a $10.1 billion judgment against respondent Philip Morris USA Inc. ("PM USA") for allegedly violating the Illinois Consumer Fraud and Deceptive Business Practices Act ("CFA") by using the descriptors "lights" and "lowered tar and nicotine" on certain brands of cigarettes. The damages award was not designed to compensate the class for any personal injuries; instead, accepting petitioners' "novel" damages theories, Pet. App. 85a, the trial court ordered a refund of 92.3% of the purchase price (including sales and excise taxes) of every package of Marlboro Lights and Cambridge Lights (together, "Lights") sold in Illinois over the course of three decades. The Illinois Supreme Court *sua sponte* granted a direct appeal from the trial court, reversed, and ordered judgment entered in favor of PM USA, on the ground that plaintiffs' state-law claims were barred by a state statutory exemption contained in the CFA.[2]

This Court has no jurisdiction to review this decision. In reversing the trial court's $10.1 billion judgment, the Illinois Supreme Court held that section 10b(1) of the CFA provides a *state-law* defense where the conduct challenged under the CFA was "specifically authorized by the laws administered

---

[2] This was the second time in six months that the Illinois Supreme Court reversed a billion-dollar class action judgment imposed by southern Illinois trial courts, which became a magnet for class action litigation after a $1 billion judgment was entered against State Farm in 2002 in a nationwide class action. *See Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801 (Ill. 2005), *cert. denied*, -- U.S. --, 126 S. Ct. 1470 (2006); *see also, e.g.*, Lester Brickman, *Anatomy of a Madison County (Illinois) Class Action: A Study of Pathology*, 6 Civil Justice Report (Aug. 2002), *available at* http://www.manhattan-institute.org/html/cjr_6.htm (finding that Madison County had become third nationwide in the number of class actions filed).

by any regulatory body," such as the Federal Trade Commission ("FTC"). 815 ILCS 505/10b(1) (2005).[3] The court held that, as a matter of Illinois law, the "specific authorization required to trigger the exemption of section 10b(1) does not require formal rulemaking" and, indeed, "need not be express." Pet. App. 86a. Applying that definition to the evidence presented at trial, the court concluded that through its "regulatory activity, including the resolution of an enforcement action by means of a consent order," the FTC had "implicitly provided" PM USA with the kind of authorization for its use of the descriptors that was necessary under state law to trigger the exemption. *Id.*

To remove any possible doubt about the basis for its decision, the Illinois Supreme Court stated unequivocally that "[w]e have resolved the present case ***entirely on the basis of state law*** by construing and applying an exemption clause in a state statute." *Id.* 87a (emphasis added); *see also, e.g., id.* (interpretation of the statutory exemption "is not dependent on the intent of Congress," but rather "the intent of the Illinois General Assembly"). The question decided by the court was quintessentially one of state legislative policy concerning the scope of a state-law statutory defense. As a result, the decision does not present an issue of federal law within this Court's *certiorari* jurisdiction. *See* 28 U.S.C. § 1257(a).

Even if the case were somehow within this Court's jurisdiction, it still would fail to present any "compelling reasons" warranting review. *See* Sup. Ct. R. 10. The "conflict" petitioners rely upon simply does not exist. Not one of the supposedly conflicting federal cases petitioners cite arose in the context of a state consumer protection statute, let

---

[3] The court also held that petitioners' Deceptive Practices Act claims were barred under a parallel provision, 815 ILCS 510/4, which exempts from liability conduct that is "in compliance with the orders" of an agency. Pet. App. 87a. The analysis for both provisions is the same.

alone involved the proper interpretation of the CFA or its statutory exemption. Nor does the Illinois Supreme Court decision conflict with any of the cases petitioners cite. For example, petitioners argue that the decision below somehow conflicts with federal decisions holding that a consent decree is not enforceable against a non-party. Far from taking a conflicting view, the Illinois Supreme Court *agreed* that a "consent order may be enforced only against the party who agreed to the terms of the order," Pet. App. 67a, but held that that principle did not end the inquiry under state law. That conclusion, which was based entirely on the court's interpretation of the CFA, does not conflict with any federal court decision.[4]

STATEMENT OF THE CASE

A. The Complaint

In February 2000, petitioners filed their initial class action complaint in the Circuit Court for Madison County on behalf of all persons who purchased even a single pack of Lights in Illinois since Marlboro Lights were first marketed in 1971. Petitioners alleged that PM USA had violated the CFA and had been unjustly enriched by misrepresenting Lights as "light" and as having "lowered tar and nicotine" (and thus

---

[4] In fact, as demonstrated below, petitioners have waived the argument that they advance in their Petition -- *i.e.*, that federal law governs the application of the CFA's exemption. That is another reason to deny the Petition. *See, e.g., Bath Iron Works Corp. v. Dir., Office of Workers' Comp. Programs*, 506 U.S. 153, 162 n.12 (1993) (finding that issues not raised below were waived); *Auer v. Robbins*, 519 U.S. 452, 464 (1997) (declining to consider argument "inadequately preserved in the prior proceedings").

presenting a reduced risk of disease) in comparison to "regular" or full-flavor cigarettes. *See* C.6, 11.[5]

Petitioners did not dispute that Lights have always yielded less tar and nicotine than full-flavor cigarettes when measured pursuant to the method mandated by the FTC (the "FTC Method"). Petitioners contended, however, that the FTC Method is flawed because it uses a machine that smokes cigarettes according to a strict set of standardized conditions and does not take into account that smokers may alter the amount of tar and nicotine actually inhaled by changing their smoking behavior. C.42432-33; C.15810. For example, if a smoker switches from smoking full-flavor cigarettes to smoking Lights and "compensates" -- by, for example, smoking more cigarettes or taking deeper or more frequent puffs -- the smoker may receive more tar and nicotine than indicated by the FTC's measurements. C.6; C.11; C.42437-38.[6] Petitioners contended that Lights smokers compensated

---

[5] Citations to "C.xx" are to documents in the common law record on appeal, citations to "R.xx" are to transcript record cites, and citations to "MIPM-xx" are to exhibits in the record on appeal.

[6] The FTC was well aware of this limitation of its method at the time it adopted the method in 1967. In fact, at the time, the FTC issued a press release advising that it "has not attempted to gauge the test to the amount of smoke, or tar and nicotine, which the 'average' smoker will draw from any particular cigarette" and that "the purpose of testing is not to determine the amount of tar and nicotine inhaled by any human smoker." MIPM-7147. Nonetheless, the FTC decided to use this method because the "Commission consider[ed] it most important [to have] test results . . . based on a reasonable standardized method . . . capable of being presented to the public based on a uniform method used by all laboratories." *Id.* In fact, in 1970, the FTC went a step further and compelled the tobacco companies (including PM USA) to agree to include FTC-measured tar and nicotine yields in all advertising with a disclosure that the yields were on "av. per cigarette by FTC Method." *See, e.g.*, MIPM-7030. The FTC also made clear that it would be deceptive to advertise any yield measurement not based on the FTC Method, even if the measurements were higher than

to such an extent that they all inhaled as much as tar and nicotine as they would have with full-flavor cigarettes. C.6, 11; C.42437-38.

Petitioners did not seek personal injury damages. Instead, they sought purported "economic" damages on the ground that they paid too much for the perceived health benefits associated with Lights -- even though it was undisputed that Lights have always been priced the same as their full-flavor counterparts. C.13. Based on a 276-person internet survey, petitioners claimed that, if class members could have chosen a truly "safer" cigarette, they would have required on average a 92.3% discount before purchasing Lights. Pet. App. 192(a).[7] Notably, 17 of the 23 class members who testified at trial continued to purchase Lights -- without requiring any reduction in price -- even after participating in the lawsuit and being informed about the claimed deception.[8]

Before trial, PM USA sought summary judgment on several grounds, arguing (among other things) that it was exempt from any CFA claim because its use of the descriptors had been "specifically authorized" by the FTC within the meaning of section 10b(1). Pet. App. 30a-31a. Petitioners claimed that the FTC's informal regulatory activities were insufficient

---

those produced by the FTC Method. *In re Lorillard*, 92 F.T.C. 1035 (1978).

[7] Petitioners used an internet survey in which smokers "were asked to assume that Marlboro Lights were more hazardous than full-flavor cigarettes and to imagine the existence of a Marlboro Light that was identical in all other respects to the current product, except that it was truly safer to smoke." Pet. App. 42a. The smokers "were then asked to state how much of a discount would be required to cause them to purchase the more hazardous product if the safer version were actually available." *Id.*

[8] *See* R.3284; R.4528-30; R.10285; R.7201-02; R.7304; R.7917; R.10027; R.10075; R.10161, 10181-82; R.10297, 10302; R.10344; R.10448; R.10869; R.10937, 10956-58; R.10984; R.11618-21; R.5718-19.

as a matter of Illinois law to satisfy the statutory requirement that conduct be "specifically authorized." *Id.* at 31a. The trial court stayed PM USA's motion for summary judgment, finding that issues of material fact existed and reserving judgment on these defenses for trial. C.20753-55.

B. Trial

A class was certified over PM USA's objections. On the first day of trial, in January 2003, petitioners voluntarily dismissed their common law unjust enrichment claim, leaving only their CFA claim. Because there is no right to a jury trial on a CFA claim, petitioners' claims were tried to the court.

At trial, PM USA introduced the expert testimony of Dr. John Peterman on the issue of the FTC's regulatory activities with respect to tar and nicotine measurements, disclosures, and marketing. *See generally* R.06260-6450; 6454-6526; 6514-6690; 6694-6758. He opined that PM USA's marketing of Lights at all times complied with the policies and objectives of, and was specifically authorized by, the FTC's regulatory program. *See, e.g.*, R.6471. Plaintiffs did not offer any expert to rebut Dr. Peterman's testimony.

Among other things, Dr. Peterman testified about the variety of tools -- including consent decrees -- that the FTC uses to regulate industries informally. He explained that the FTC frequently brings a complaint against a single company -- and seeks to reach a consent decree with that company -- in order to "prov[ide] guidance to other firms in the industry." R.6329.

Dr. Peterman testified about two consent decrees entered into by the FTC that he opined authorized the use of descriptors such as "lights" and "lowered tar and nicotine." *First*, in 1969, the FTC brought an action against another cigarette manufacturer, American Brands, charging it with making unsubstantiated claims that certain of its brands were

"low in tar when in fact they ranked really relatively high in comparison to many other brands." R.6466. Ultimately, the action was resolved through a consent decree, in which the FTC approved the "use of the words 'low,' 'lower,' or 'reduced' or like qualifying terms" to describe cigarettes so long as the terms were accompanied by "a clear and conspicuous disclosure of . . . [t]he tar and nicotine content in milligrams in the smoke produced by the advertised cigarette," as measured by the FTC Method. MIPM-7293; *see also* R.6467-68. Consistent with the FTC's policy for all proposed consent decrees, 16 C.F.R. § 2.34, before the consent decree was finalized, it was published for public notice and comment. MIPM-7032.

Second, in 1995, the FTC entered into another consent decree with American Tobacco that reaffirmed its policy permitting descriptors. Again, the FTC published this consent decree for notice and comment before it was finalized. *See* 59 Fed. Reg. 51,980 (Oct. 13, 1994) (MIPM-7301); MIPM-7299. In this consent decree, the FTC indicated again that it would permit representations that a brand is "'low,' 'lower,' or 'lowest' in tar and/or nicotine," so long as the claim was substantiated by FTC Method results. MIPM-7299 at 3.

These consent orders were not the only evidence of the FTC's authorization of the use of lights descriptors. For example, in 1967, the FTC issued its "enforcement policy" with respect to "representations relating to tar and nicotine content of cigarettes," explaining that the FTC would *not* challenge representations that were "fully substantiated" by FTC Method results. MIPM-7366. Similarly, during its investigation of another brand of low tar cigarette not at issue here (Barclay), the FTC indicated that it would be permissible for the brand to be advertised as "low tar" since "the FTC yield in terms of tar for Barclay was estimated within the range of 3 to 7 milligrams of tar." R.6472. And in 1992, at the behest of a consumer group, the FTC launched an

investigation focused specifically on whether terms like "lights" and "low tar" were deceptive and should be banned -- ultimately deciding to take no action. *See* R.6503-11. The evidence also indicated that the FTC was currently considering whether to revise its policies regarding descriptors. 62 Fed. Reg. 48,158 (Sept. 12, 1997) (MIPM-7123); Pet. App. 23a.

At the close of the evidence, both parties submitted proposed findings of facts and conclusions of law. The trial court adopted the petitioners' findings of fact and conclusions of law verbatim, including typographical errors. The judge found that all of the estimated 1.14 million class members had interpreted the descriptors "lights" and "lowered tar and nicotine" to convey a message of lower risk, that this message was relied on to some degree by every class member, that compensation was "complete" so that not a single class member had received less tar and nicotine, and that each class member had suffered an "economic loss" of 92.3% of the purchase price of Lights. Pet. App. 167a-213a.

The trial court awarded $7.1 billion in compensatory damages, including over $2 billion in prejudgment interest. Pet. App. 194a. The court then awarded an additional $3 billion in punitive damages. *Id.* And the judge allocated approximately $1.775 billion of the award to petitioners' counsel for fees and expenses. *Id.* at 213a-214a. Assuming that a significant portion of the award would go unclaimed, the court provided for the distribution of the unclaimed award on a *cy pres* basis to law schools, domestic violence programs, legal aid services, and the American Cancer Society. *Id.* at 214a-215a.

In finding for petitioners, the trial court rejected PM USA's arguments that the use of the challenged descriptors was "specifically authorized" by the FTC within the meaning of the CFA. *Id.* at 202a. The court concluded that "no

regulatory body had ever required (or even specifically approved) the use" of the terms "lights" and "lowered tar and nicotine." *Id.*

C. The Illinois Supreme Court Decision

The Illinois Supreme Court *sua sponte* granted a direct appeal (bypassing review in the intermediate appellate court) and reversed the trial court's judgment. The court held that petitioners' claims were barred by section 10b(1), which precludes a CFA claim if the "[a]ctions or transactions [at issue are] specifically authorized by laws administered by any [federal] regulatory body or officer acting under statutory authority of this State or the United States." 815 ILCS 505/10b(1). The court recognized that "the [Illinois] legislature clearly intended for certain actions . . . to be exempt from liability . . . without regard to the possible merits of the asserted claim." Pet. App. 59a.

The Illinois Supreme Court held that whether the FTC had "specifically authorized" the use of the challenged descriptors depended on the proper interpretation of the CFA. *Id.* at 56a-58a. The court explained that, in determining whether the statutory exemption "operates to bar the action at issue," it must examine "the language of the statute, which is the most reliable indicator of the legislature's objectives." *Id.* at 57a. The court concluded that the plain language indicated that the "specific authority . . . may be either express or implied," and that "formal agency rulemaking is not required" for authorization under state law. *Id.* This interpretation was also "consistent with apparent legislative intent and with the public policy embodied in the Consumer Fraud Act." *Id.* at 58a.

The Illinois Supreme Court concluded further that this interpretation was confirmed by its own precedents. *See id.* at 65a-67a. After a lengthy examination of "Illinois case law," it determined that its precedents established several

"propositions that are relevant to the present case," including that "a regulatory body may specifically authorize conduct by regulated entities without engaging in formal rulemaking" and that the authorization "need not be express." *Id.* at 66a-67a.

Only after its analysis of the plain language, legislative intent, and prior Illinois case law did the Illinois Supreme Court turn to "other authorities," such as "the FTC's own published materials" and federal decisions. *Id.* at 67a. These materials "support[ed]" the court's "conclusion that specific authorization for the use of the disputed descriptors may be found in consent orders rather than in formally promulgated trade regulation rules of the FTC." *Id.* at 79a.

Finally, the Illinois Supreme Court determined that the 1971 and 1995 consent decrees (described above) -- when considered in conjunction with the entire FTC history of regulating tar and nicotine measurements, disclosures, and marketing, *see id.* at 2a-23a -- provided authorization for the use of the lights descriptors. The court concluded that the 1971 consent decree, for purposes of the state exemption, "specifically authorize[d] all United States tobacco companies to utilize the words 'low,' 'lower,' 'reduced' or like qualifying terms, such as 'light,' so long as the descriptive terms are accompanied by a clear and conspicuous disclosure" of FTC-measured tar and nicotine yields. *Id.* at 79a. Further, "the FTC reiterated this authorization in the 1995 consent order." *Id.* "Thus," the court held, "plaintiffs' claim is barred by section 10(b)(1) of the Consumer Fraud Act." *Id.* at 80a.

Two of the justices in the majority filed a specially concurring opinion explaining that they also would have reversed the judgment on the ground that petitioners' claims failed as a matter of law because petitioners "sustained no actual [economic] damages." *Id.* at 98a. As the justices

noted, "[t]here was no price disparity between light cigarettes and their full-flavored counterparts," which meant that "the net change in consumers' economic position" as a result of the alleged fraud was "zero." *Id.* at 91a, 95a. The majority opinion echoed the concurring justices' view, expressing "grave reservations about the novel approach to the calculation of damages that was offered by the plaintiffs and accepted by the circuit court." *Id.* at 85a.

Although the majority found it unnecessary to decide the issue, it also explained that it had serious reservations about the propriety of the trial court's decision to certify a class. In particular, the court noted that the trial court had not found, as Illinois Supreme Court precedent required, that all of the class members had actually been deceived by the descriptors in question. *Id.* at 82a-83a. Nor had it found that such alleged deception was the "but for" cause of each purchasing decision. *Id.* at 83a. The court expressed skepticism as to "whether it can reasonably be said that deception created by the words 'Lights' and 'lowered tar and nicotine' on packages of Marlboro Lights and Cambridge Lights was the 'but for' cause of millions of purchasing decisions made over a period of some 30 years by the 1.14 million members of the plaintiff class." *Id.* at 84a. The court also expressed skepticism about the trial court's finding that all members of the class had compensated so that none of them had received less tar and nicotine. *Id.* at 85a. While not resolving these issues, the court pointedly noted its "reservations about the existence of individual issues that might make class certification inappropriate." *Id.*

REASONS FOR DENYING THE PETITION

I. THIS COURT HAS NO JURISDICTION TO GRANT THE PETITION

This Court's jurisdiction to review final state court judgments is constrained by 28 U.S.C. § 1257(a). Under section 1257(a), the Court may issue a writ of certiorari to a state supreme court only when the "state court determination[] . . . rest[s] upon federal law." *Oregon v. Guzek*, -- U.S. --, 126 S. Ct. 1226, 1229 (2006); *see also Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945) ("Our only power over state court judgments is to correct them to the extent that they incorrectly adjudge federal rights."); *Henry v. Mississippi*, 379 U.S. 443, 447 (1965) ("[W]e have no power to revise judgments on questions of state law.").

The petition here presents only a state law question and therefore falls outside this Court's jurisdiction. The Illinois Supreme Court held that the FTC's actions -- none of which was in dispute[9] -- "specifically authorized" PM USA's use of the descriptors within the meaning of the state statutory exemption, thereby giving PM USA a state law defense. The court found that section 10b(1) does not require formal rulemaking or official definitions or any other type of express approval. Pet. App. 57a. Rather, a consent order allowing one member of the industry to use descriptors fits within the meaning of "authorization" under section 10b(1) for other similarly situated industry members. *Id.* at 66a, 72a.

---

[9] *See* Pet. App. 50a-51a ("the actions of the FTC with relation to the use of [descriptors] in cigarette advertising and labeling are a matter of public record" and "essentially undisputed"). Even if there were such a factual dispute, it would not be worthy of this Court's review. *See, e.g.*, Sup. Ct. R. 10 (certification "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law").

In so holding, the Illinois Supreme Court made clear that it was relying on state, not federal, law. Throughout its opinion, the court expressed its objective as "to ascertain and give effect to the intent of the legislature." *Id.* at 56-57a. The court therefore based its decision on its reading of the plain language of the state statute, *id.* at 57a-58a, other indicia of the Illinois legislature's intent, *id.* at 58a-59a, and its own prior decisions, *id.* at 60a-67a. Based on this *state-law* authority, the court concluded that the authorization need not "be express" or "formal." *Id.* at 66a.[10]

Finally, to put aside any doubt about the matter, the court took pains to declare unequivocally that it was deciding the case based solely on state law and not on federal law:

> ***We have resolved the present case entirely on the basis of state law by construing and applying an exemption clause in a state statute*** . . . . Operation of [the statute] is not dependent on the intent of Congress. ***Rather it is dependent on the intent of the Illinois General Assembly*** to allow regulated entities to engage in commercial conduct that might otherwise be alleged to be fraudulent or deceptive without the risk of civil liability, so long as that content is specifically authorized by the regulatory body.

Id. at 87a (emphases added).

---

[10] The court found that its broad interpretation of "specifically authorized" satisfied the Illinois legislature's goal of channeling objections to agency policy and practice into the political process rather than into the courts: "Parties who desire to bring about change in agency policies or rules can take their complaints to the agency itself and can participate in the formal rulemaking process. If their concerns are not addressed by the agency, they may seek assistance from their legislators . . . ." *Id.* at 59a.

This statement "indicates clearly and expressly that" the state court's decision was independent of federal law. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (In these circumstances "we, of course, will not undertake to review the decision."). Given the clarity with which the Illinois Supreme Court relied on state law in interpreting section 10b(1), it is undeniable that, no matter how this Court interprets federal law, the Illinois Supreme Court's decision would remain the same. This Court therefore has no jurisdiction to review that determination. *See, e.g.*, *Herb*, 324 U.S. at 125-26; *Henry*, 379 U.S. at 447; *Long*, 463 U.S. at 1041; *Lambrix v. Singletary*, 520 U.S. 518, 523 (1997) ("Since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory."); *Sochor v. Florida*, 504 U.S. 527, 533-34 (1992) ("[T]his Court lacks jurisdiction . . . if the state court's opinion indicates clearly and expressly" reliance on a "state ground.") (internal quotation marks omitted); *Illinois v. Rodriguez*, 497 U.S. 177, 182 (1990) ("When a state-court decision is clearly based on state law . . . we will not review the decision."); *Illinois v. Gates*, 462 U.S. 213, 218 (1983) (Court has "no jurisdiction unless a federal question has been both raised and decided in the state court below").

Anticipating this problem, petitioners cite to a single, 64-year old decision -- *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942) -- in support of this Court's jurisdiction. *See* Pet. at 27-30.[11] However, *Standard Oil* only confirms that there is no jurisdiction here.

---

[11] Commentators have criticized *Standard Oil*'s exercise of jurisdiction as resting "on shaky theoretical ground." Wright & Kane, 20 *Fed. Prac. & Proc. Deskbook* § 114 (2006); *see also, e.g.*, Robert J. Greene, *Hybrid State Law in the Federal Courts*, 83 Harv. L. Rev. 289, 322 (1969) ("On balance it would seem best to discard some of the broader implications of *Standard Oil*.").

Standard Oil involved a decision by the California Supreme Court construing whether a state statutory tax exemption for the U.S. government applied to the U.S. Army Post Exchanges. This Court recognized that, if the California Supreme Court's "construction of [the state statute] had been based purely on local law, this construction would have been conclusive." 316 U.S. at 483. However, in that case, "the court did not rely upon the law of California," but rather based its decision "upon its determination concerning the relationship between post exchanges and the government of the United States, a relationship which is controlled by federal law." *Id.*

By contrast, here, the Illinois Supreme Court was explicit that its "construction" was "based purely on local law" and that it was "rely[ing] upon the law of [Illinois]." There was no "determination concerning [a] relationship . . . controlled by federal law." *Id.* Therefore, even under *Standard Oil*, the state court's "construction" is "conclusive."

Indeed, it is not clear how the Court would even go about formulating a "federal question" it could decide in this case. Petitioners claim that the question is whether, as a matter of federal law, consent decrees create a safe harbor immunizing the conduct of non-parties from state laws. But that is neither the issue here nor the issue decided by the Illinois Supreme Court.[12] To the contrary, the court was applying its own interpretation of the Illinois requirement of "specific authorization," which it held could include both informal and implicit authorization based on a variety of regulatory conduct, including the issuance of consent decrees. Nowhere in this calculus is there even a subsidiary federal question.

---

[12] Notably, petitioners below did not even cite any of the federal authorities upon which they rely upon now in their effort to seek this Court's review. *See infra* at 25-26.

Petitioners emphasize that the Illinois Supreme Court looked to "federal authorities and FTC statements" in addition to state-law sources. Pet. at 29. However, mere citation to federal materials does not create a federal issue subject to this Court's jurisdiction. If that were true, virtually any state law issue could be converted to a federal one because state courts routinely cite federal authorities. *See Long*, 463 U.S. at 1041. For that very reason, this Court has indicated that a court wishing "merely to rely on federal precedents as it would on the precedents of all other jurisdictions . . . need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel that the result the court has reached." *Id.* Here, that is exactly what the court did when it stated that it was merely looking at these federal materials as "additional authority," Pet. App. 67a, and that these authorities in no way compelled the result the court reached: "We have resolved the present case entirely on the basis of state law by construing and applying an exemption clause in a state statute." *Id.* at 87a; *see also id.* at 79a (reading federal authorities only "in conjunction with Illinois law").[13]

---

[13] The limited nature of the Illinois Supreme Court's use of federal authorities is further illustrated by its treatment of *Watson v. Philip Morris Cos.*, 420 F.3d 852 (8th Cir. 2005), *petition for cert. filed*, 74 U.S.L.W. 3588 (U.S. Apr. 7, 2006) (No. 05-1284) & *invitation to U.S. Solicitor General to participate pending* (U.S. May 22, 2006). The Illinois court specifically noted the fundamental difference between *Price* and *Watson* by stating that it was relying on *Watson* only for its factual discussion of the FTC's regulation of cigarette advertising: "The issue addressed by the *Watson* court -- whether removal to federal court was proper -- has no bearing on the present case." Pet. App. 79a. *Watson* addresses whether, based on the entire history of FTC regulatory activity, PM USA was acting under FTC direction for purposes of a federal statute -- the federal officer removal provision. *See id.* at 77a-79a. By contrast, the issue here is whether two consent decrees (considered in the context of the FTC's five-decade regulatory history) provide authorization within the meaning

In sum, there is no federal question here that would give this Court jurisdiction. The Illinois legislature and Illinois courts are clearly free to decide, based on the state's own policies, whether consent decrees constitute the kind of "authorization" that satisfies section 10b(1) of the CFA, regardless of federal law. For this reason, this Court lacks jurisdiction to grant *certiorari* review.

II. EVEN IF THIS COURT HAD JURISDICTION, THIS CASE WOULD NOT WARRANT REVIEW

Even if this Court somehow had jurisdiction over this case, it still would not be certworthy. Not one of the cases petitioners cite as creating a "conflict" has anything to do with the CFA's statutory exemption or the meaning of the statutory phrase, "specific authorization." All of petitioners' cases focus on issues of federal administrative law having nothing to do with the dispositive state-law issue here -- the scope of the CFA's section 10b(1) defense.[14]

---

of an Illinois state statute. In short, although the two decisions may discuss the same history of FTC regulation, the cases involve fundamentally different legal issues and standards.

[14] Petitioners note that a number of states have exemptions like section 10b(1) of the CFA and suggest that there should be consistency in the application of those exemptions. Pet. at 26. But each state is clearly free to decide the scope of its own exemption based on its own legislative policy. Two federal district courts have found that similar statutory exemptions in Louisiana and Michigan also preclude claims virtually identical to those asserted here. *See Sullivan v. Philip Morris USA Inc.*, No. 03-796, 2005 WL 2123702, at *9 (W.D. La. Aug. 31, 2005), *appeal granted on other grounds*, Nos. 06-1, 06-30311 (5th Cir. Mar. 27, 2006); *Flanagan v. Altria Group, Inc.*, No. 05-71697, 2005 WL 2769010, at *2, 7 (E.D. Mich. Oct. 25, 2005). A Massachusetts court reached the opposite conclusion under its state's exemption. *See Aspinall v. Philip Morris, Cos., Inc.*, No. 98-6002, slip op. (Mass. Super. Ct. Aug. 9, 2006) (submitted by the trial court for interlocutory review).

Furthermore, the alleged "conflicts" are "conflicts" only in petitioners' imagination. The authorities upon which petitioners rely reflect a *consistent* body of case law regarding federal consent decrees -- case law that does not conflict in any way with the Illinois Supreme Court decision. As demonstrated below, circuit courts without exception recognize that consent decrees are flexible tools that agencies often use to provide direction and set agency policies with respect to a regulated industry. The Illinois Supreme Court's recognition of this fact is entirely consistent with federal court decisions. Nor do federal court holdings that consent decrees are enforceable only against the parties to the decree create any conflict with the decision below. The Illinois Supreme Court expressly *agreed* with this principle, but held as a matter of state law that it did not define the scope of the section 10b(1) defense. Finally, nothing in the Illinois Supreme Court's holding is inconsistent with the holdings of this Court.

A. No Conflict Exists As To Whether Agencies Can Use Consent Decrees To Provide Direction And Set Regulatory Policy.

Petitioners do not dispute that consent decrees can provide "specific authorization" at least to the actual parties to the decree. At most, plaintiffs contend that there is a circuit split as to whether federal agency consent decrees can provide implicit authorization to other participants in the same industry that were not party to the consent decree. Pet. at 11-14.

No such circuit split exists. Rather, courts -- including this Court -- have recognized in a variety of contexts that federal agencies often set industry-wide policies through administrative adjudications and other informal means, including advisory letters, staff interpretations, and consent decrees. *See, e.g., NLRB v. Bell Aerospace Co.*, 416 U.S.

267, 294 (1974) ("Adjudicated cases may and do . . . serve as vehicles for the formulation of agency policies which are applied and announced therein.") (citation and internal quotations omitted); *Cent. Tex. Tel. Co-op, Inc. v. FCC*, 402 F.3d 205, 210 (D.C. Cir. 2005) ("Agencies often have the choice of proceeding by adjudication, rather than rulemaking . . . . Orders handled down in adjudications may establish broad legal principles."); *San Francisco Police Officers' Ass'n v. City & County of San Francisco*, 812 F.2d 1125, 1129 (9th Cir. 1987) (consent decree establishes policies that should be afforded preemptive weight), *op. amended and superseded by*, 869 F.2d 1182 (9th Cir. 1988).[15]

Indeed, the FTC is particularly accustomed to setting policy and authorizing conduct by the use of consent orders. *FTC v. Mandel Bros. Inc.*, 359 U.S. 385, 391 & n.6 (1959); *see also, e.g., Holloway v. Bristol-Myers Corp.*, 485 F.2d 986, 997-99 (D.C. Cir. 1973) (explaining FTC's history of using informal means to regulate); *Gen. Motors Corp. v. Abrams*, 897 F.2d 34, 39 (2d Cir. 1990) (FTC consent decree establishes policies that should be afforded preemptive weight); *Alaska v. O'Neill Investigations, Inc.*, 609 P.2d 520, 529 (Alaska 1980) (FTC consent decrees constitute "administrative interpretation" with "precedential value"); *Schubach v. Household Fin. Corp.*, 376 N.E.2d 140, 141 (Mass. 1978) (FTC's policy inferred from complaints and cease and desist orders). The FTC has even superimposed the procedural hallmark of rulemaking -- notice and comment -- on the

---

[15] Petitioners argue that *Bell Aerospace* demonstrates that "agencies often choose adjudication to avoid formulating universal standards." Pet. at 23. Although this is true, it is only half the story and ignores that adjudication is another flexible tool in an agency's arsenal in regulating an industry. As this Court recognized in *Bell Aerospace*, although an agency *can* use adjudication to avoid formulating universal standards, an agency also is "not precluded from announcing new principles in an adjudicative proceeding." 416 U.S. at 294.

process for formulating consent decrees. *See* 16 C.F.R. § 2.34 (requiring notice and comment for all proposed consent decrees). The FTC's use of such procedures demonstrates its recognition that consent decrees are flexible tools and can be used to set policy for industries as a whole -- not just the participants involved in the proceeding.[16] In fact, some courts have recognized that, when an agency permits one member of an industry to engage in certain conduct in a consent decree, the agency cannot prohibit similarly situated competitors from engaging in the same conduct. *See, e.g., Ford Motor Co. v. FTC*, 547 F.2d 954, 959-61 (6th Cir. 1976) (holding that the FTC must afford the same treatment to one competitor that it has allowed to another competitor in an earlier consent decree).[17] The Illinois Supreme Court's

---

[16] There is ample support in the record for the conclusion that FTC officials viewed consent decrees and other informal actions as the means by which to set industry-wide policies. *See, e.g.*, Pet. App. 78-79a (describing former FTC Chairman Daniel Oliver's statement that the FTC prefers "informal regulation via the use of enforcement actions and consent orders rather than formal rulemaking"); *see also, e.g.*, Charles H. Koch, Jr., 2 Administrative Law & Practice § 5.43[2] (1997) ("consent orders . . . do express a good deal of the law of the agency. A practitioner will pay as much attention to consent orders as to adjudicated decision."); 2 Federal Procedure § 2:71 (Lawyers Ed. 2005) ("[A]dministrative agencies can and do make pronouncements of future applicability when deciding an adjudicatory matter, in the same manner as a court may announce what the common law is in deciding a case."); Alfred Aman & William T. Mayton, Administrative Law § 9.4 (West 1993); K.C. Davis, Administrative Law & Government at 283 (2d ed. 1975).

[17] *See also, e.g., Airmark Corp. v. FAA*, 758 F.2d 685, 692 (D.C. Cir. 1985) (vacating agency's orders regarding exemptions from noise regulations because the agency's treatment of different entities was "grossly inconsistent and patently arbitrary"); *Contractors Transp. Corp. v. United States*, 537 F.2d 1160, 1162 (4th Cir. 1976) (vacating agency's decision not to permit conduct it had previously permitted, stating that "[p]atently inconsistent application of agency standards to similar situations lacks rationality and is arbitrary"); *Marco Sales Co. v. FTC*, 453

conclusion that two consent decrees (considered in light of the FTC's five-decade regulatory history) constitute sufficient authorization of the use of descriptors to trigger the statutory exemption of the CFA is consistent with this body of well-established authority.[18]

The cases petitioners cite are not to the contrary. For example, petitioners rely heavily on *Trans Union Corp. v. FTC*, 245 F.3d 809 (D.C. Cir. 2001) (cited in Pet. at 11-12), but that case did not address the extent to which a consent decree can provide authorization to other industry participants. Instead, that case dealt with two arguably

---

F.2d 1, 7 (2d Cir. 1971) ("[L]aw does not permit an agency to grant to one person the right to do that which it denies to another similarly situated.") (quoting *Mary Carter Paint Co. v. FTC*, 333 F.3d 654, 660 (5th Cir. 1954) (Brown, J., concurring)); *El Rio Santa Cruz Neighborhood Health Ctr. Inc. v. Dep't of Health & Human Servs.*, 300 F. Supp. 2d 32 (D.D.C. 2005) ("It is axiomatic that an agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so.") (internal quotation marks and citation omitted); *United States v. Undetermined Quantities of an Article of Drug Labeled as Exachol*, 716 F. Supp. 787, 794-96 (S.D.N.Y. 1989) (finding that, because the FDA treated one company a certain way in a determining when to take enforcement action, it had to treat defendant the same way).

[18] Petitioners contend erroneously that PM USA conceded in two submissions filed before the FTC that the FTC did not authorize the use of descriptors. The 2002 Petition for Rulemaking (FTC Sept. 18, 2002), MIPM-7543, had nothing to do with the issue in this case, but was filed to request that, given *new* scientific developments, the FTC should develop a *new* regime for the use of descriptors. Notably, PM USA explicitly stated in that petition that the FTC had approved the use of existing descriptors: "[t]he FTC has specifically permitted the use of descriptors such as 'low,' 'lower,' and 'reduced' tar that reflect the [FTC] Method's yield measurements." *Id.* at 4. Similarly, in its 1997 submission, PM USA also acknowledged that the FTC had authorized descriptors, noting that the "established use" for these descriptors is to describe tar and nicotine yields according to the FTC Method and that "changes in the established use of those terms could lead to substantial confusion." MIPM-7336, at 95.

inconsistent FTC orders entered at two different points in time against the same party. The issue before the D.C. Circuit was how to resolve any alleged inconsistency that may have existed. Ultimately, the court determined that no inconsistency existed. *Id.* at 816-17. Here, in contrast to *Trans Union*, there is no dispute that the FTC's actions and its consent decrees point in one direction: that the use of descriptors was permissible so long as they were substantiated by FTC Method results.

In fact, *Trans Union* supports the notion that consent decrees provide informal authorization of the actions of similarly situated non-parties. The *Trans Union* court acknowledged that the Commission's failure to treat similarly situated parties in the same manner "might suggest that the Commission has acted arbitrarily and capriciously." *Id.* at 816. Thus, *Trans Union* implies -- as other courts have held -- that the FTC must treat all parties in an industry alike so that permitting action by one industry member would constitute permission to other members as well. *See supra* at 18-21.

Similarly, *Beatrice Foods Co. v. FTC*, 540 F.2d 303 (7th Cir. 1976) (cited in Pet. at 12-13), does not conflict with *Price*. There, the defendant claimed that its acquisition was not a violation of the Clayton Act by relying on an earlier consent decree involving another party and the FTC. *Id.* at 312. The Seventh Circuit rejected the argument, noting that there were factual differences between the case before it and the earlier consent decree. *Id.* As petitioners note, the Seventh Circuit also acknowledged that the FTC can subsequently change its mind, and the mere fact that it entered into one consent decree does not mean it is eternally bound to positions taken in that decree. *Id.* But that does not refute the principle that consent decrees can provide authorization to an industry where the FTC has not changed

its mind but instead has been consistent in its views -- as is the case here.

B. No Conflict Exists As To Whether A Consent Decree Can Be Enforced Against A Non-party -- An Irrelevant Issue Here.

Petitioners also claim a "circuit split" as to whether a consent decree can be enforced against a non-party. *See Intergraph Corp. v. Intel Corp.*, 253 F.3d 695 (Fed. Cir. 2001) (cited in Pet. at 13); *Sakon v. Pepsico, Inc.*, 553 So. 2d 163 (Fla. 1989) (cited in Pet. at 14); *Whitinsville Plaza, Inc. v. Kotseas*, 390 N.E.2d 243 (Mass. 1979) (cited in Pet. at 14). But there is no such split. Each decision that petitioners cite agreed with the self-evident proposition that an agency cannot impose liability and grant relief against one party based solely on the violation of a consent decree with someone else.[19] The Illinois Supreme Court did not hold otherwise. On the contrary, it expressly *agreed* that "a consent order may be enforced only against the party who agreed to the terms of the order." Pet. App. 67a. No conflict is created by the court's conclusion that, even if a consent decree is not binding on non-parties, it can still provide the kind of implicit, informal authorization sufficient to trigger the CFA's statutory exemption as a matter of state law. *Id.* at 54a-67a.[20]

---

[19] *See, e.g., Intergraph*, 253 F.3d at 698 ("a consent order does not establish illegal conduct"); *Sakon*, 553 So. 2d at 166 (refusing to impose liability based on consent decree and noting that "[n]o legal standard of duty is set forth in a consent order"); *Whitinsville Plaza*, 390 N.E.2d at 252 (refusing to find a "per se violation of any Federal law" based on consent decrees).

[20] Petitioners' reliance upon 15 U.S.C. § 45(m)(1)(B) (cited in Pet. at 15-16) fails for the same reason. In the amendments to that section, Congress simply codified the common sense principle that the FTC could not obtain civil penalties based on the fact that a defendant had violated a consent

C. No Conflict Exists With The Prior Holdings Of This Court.

Petitioners also rely on *United States v. Armour & Co.*, 402 U.S. 673 (1971) (cited in Pet. at 17-18), in asserting that the decision below conflicts with this Court's precedent. But, again, there is no conflict. In *Armour*, the issue was whether the terms of an antitrust consent decree prohibited a signatory to the decree from engaging in a proposed business acquisition. *Id.* at 673-75. The Court found that the terms of the consent decree did not prohibit the acquisition. *Id.* at 677-78. The case turned on the interpretation of the substantive terms of the consent decree, not who was authorized to act under it. *Armour* simply does not address the issue for which petitioner cites it -- whether a consent decree with an industry participant can implicitly authorize conduct for others in the same industry.

Petitioners' reliance upon *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961) (cited in Pet. at 16), is also misplaced and provides no basis for a claim of conflict. There, the Court merely noted that the remedies that the FTC had provided for in previous consent decrees were not binding on the Court in determining what relief was appropriate for a violation of the Clayton Act. *Id.* at 330 n.12.

---

decree to which it was not a party. Instead, the FTC would have to offer independent proof that the conduct was deceptive within the meaning of the FTC Act. *Id.*; *see also* 15 U.S.C. § 45(b). Again, that has no bearing on whether consent decrees can provide direction as to what conduct is authorized. For the same reason, petitioners' argument that consent orders are "not controlling case precedent," Pet. at 18-19 (citation and quotation omitted), is irrelevant and fails.

The Court did not address whether consent decrees can provide informal or implicit authorization by the FTC.[21]

Finally, *Local Number 93, International Association of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986) (cited in Pet. at 17), held only that a third party cannot preclude other parties from entering into a consent decree. *Id.* at 529. Although petitioners rely upon the *Local Number 93* Court's statement that "a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree," *id.* at 529, they fail to explain how a consent decree "authorizing" conduct by a non-party imposes any such obligation. *See also supra* at 23 (distinguishing cases cited by petitioners on the basis that a party cannot base liability on the violation of a consent decree with someone else).

In short, none of this Court's cases cited by petitioners creates any conflict, let alone provides a basis for granting review in a case that was decided on entirely state law grounds.

D. Petitioners Have Waived Any Argument That The CFA's Exemption Implicates Federal Law

Finally, petitioners have waived the argument that is the basis of their Petition -- *i.e.*, that federal law governs the significance of the FTC's consent decrees even under the CFA's exemption. In opposing summary judgment in the trial

---

[21] Moreover, petitioners' argument that "judicial consent decrees are creatures of contract" is unavailing. *See* Pet. at 16-17. For example, in *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981), the Court discussed the nature of consent decrees generally as they relate to the relationship between parties to the consent decree. *Id.* at 86-87 (discussing consent decrees as "entered into by parties" after reaching "[an] agreement"). The Court did not discuss how a consent decree affects non-parties.

court, in their proposed findings of fact and conclusions of law, and on appeal in the Illinois Supreme Court, petitioners never argued that whether the consent decrees constitute "specific authorization" is an issue that should be decided as a matter of federal law. Indeed, petitioners below did not cite any of the federal authorities upon which they rely in their Petition when they argued that the CFA exemption did not apply. Instead, petitioners relied on Illinois state-law authorities.[22] This is yet another reason to deny review. *See, e.g., Bath Iron Works Corp.*, 506 U.S. at 162 n.12 (finding that issues not raised below were waived); *Auer*, 519 U.S. at 464 (declining to consider argument "inadequately preserved in the prior proceedings"). Indeed, this Court has dismissed a writ of *certiorari* as improvidently granted where "central issues on which resolution of the question presented may well turn cannot be reached or resolved" because they were not raised below. *EEOC v. Fed'l Labor Relations Auth.*, 476 U.S. 19, 24 (1986).[23]

---

[22] *See* Appellees' Br. at 66, *Price v. Philip Morris Inc.*, No. 96326 (Ill. July 12, 2004) (citing *Lanier v. Assocs. Fin., Inc.*, 114 Ill. 2d 1 (1986); *Jackson v. South Holland Dodge, Inc.*, 197 Ill. 2d 39, 51-52 (2001); *Jenkins v. Mercantile Mortgage Co.*, 231 F. Supp. 2d 737 (N.D. Ill. 2002)); C17123, C17248 (citing *Aurora Firefighter's Credit Union v. Harvey*, 516 N.E.2d 1028, 1036 (Ill. App. Ct. 1987)).

[23] The first time that petitioners argued that the issue is governed by federal law was on rehearing -- *after* the Illinois Supreme Court had already held that the CFA's exemption applied. *See* Plaintiffs-Appellees' Pet. for Rehearing at 1-2 (arguing that the Illinois Supreme Court "misapplied *federal law* regarding the scope of FTC consent orders") (emphasis added). It is axiomatic that arguments cannot be raised for the first time on rehearing. *See, e.g., Miller v. Police Board, City of Chicago*, 349 N.E.2d 544, 552 (Ill. App. Ct. 1976); *In re Club Assocs.*, 956 F.2d 1065, 1070 (11th Cir. 1992); *Exxon Chem. Patents, Inc. v. Lubrizol Corp.*, 137 F.3d 1475, 1482 (Fed. Cir. 1998).

CONCLUSION

There is no jurisdiction here. The Illinois Supreme Court was clear that it was interpreting the CFA's exemption for "specifically authorized" conduct "entirely on the basis of state law." That was within the court's authority; the Illinois legislature and Illinois courts are free to interpret that state-law provision in whatever manner they wish, without regard to federal law. The Court should deny the Petition for Writ of *Certiorari*.

Respectfully submitted,

JAMES R. THOMPSON
GEORGE C. LOMBARDI
JEFFREY M. WAGNER
JULIE A. BAUER
STUART ALTSCHULER
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, IL 60601-9703
(312) 558-5600

MURRAY R. GARNICK*
JAMES M. ROSENTHAL
ARNOLD & PORTER LLP
555 12th Street, N.W.
Washington, D.C. 20004
(202) 942-5000

MICHELE L. ODORIZZI
MAYER, BROWN, ROWE & MAW LLP
71 South Wacker Drive
Chicago, IL 60606
(312) 782-0600

KENNETH S. GELLER
MAYER, BROWN, ROWE & MAW LLP
1909 K Street N.W.
Washington, D.C. 20006
(202) 263-3000

ANDREW H. SCHAPIRO
MAYER, BROWN, ROWE & MAW LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

Counsel for Respondent

October 13, 2006

* Counsel of Record